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No. 04-232

In the Supreme Court of the United States

DAVID AARON TENENBAUM AND MADELINE GAIL TENENBAUM, PETITIONERS

v.

JOHN SIMONINI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Petitioners sued the United States and its officials, seeking recovery under constitutional and tort theories for damages resulting from a security clearance background investigation and a criminal espionage investigation, allegedly grounded in religious discrimination. The government invoked the state secrets privilege to prevent disclosure of sensitive national security information relevant to the claims and defenses at issue. This case presents the question whether the courts below properly accepted the claim of privilege, and whether the case was properly dismissed on the ground that the unavailability of information protected by the state secrets privilege precluded the government from defending against petitioners' claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-14a) is reported at 372 F.3d 776. The opinion of the district court (Pet. App. 1a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2004. The petition for a writ of certiorari was filed on August 17, 2004. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner David Aaron Tenenbaum is a civil engineer employed by the United States Army Automotive Armaments Command. Pet. App. 2a-3a. This action

arose out of investigations, including security clearance background investigations and a criminal espionage inquiry, into petitioner's handling of classified information and his relationships with representatives of the Israeli armed forces. *Id.* at 3a. In the course of the investigations, petitioner was subjected to interviews and to a polygraph examination, and he allegedly admitted unauthorized disclosure of classified information. *Ibid.* The investigation also included a search of petitioner's residence, pursuant to a valid warrant. *Id.* at 3a-4a. During the investigations, for approximately one year, petitioner was on paid leave. *Id.* at 4a. In the end, no criminal charges were brought against petitioner and he returned to full-time employment with the Command. *Ibid.*

Petitioner and his spouse[1] filed common law tort and constitutional claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against various federal employees in their individual and official capacities, and also asserted claims against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b). Petitioner alleged that he was subjected to discriminatory treatment based on his Jewish religion during the course of the investigations into his suspicious conduct. Pet. App. 3a, 12a. Following discovery, the government invoked the state secrets privilege and moved for summary judgment. *Id.* at 4a. The Attorney General and the Deputy Secretary of Defense submitted declarations invoking the state secrets privilege. *Id.* at 2a, 7a. Additional classified material was filed under seal. *Ibid.*

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[1] Petitioner Madeline Gail Tenenbaum's claims are derivative of her husband's. Pet. App. 2a n.2, 10a.

2. The district court granted the government's motion for summary judgment, concurring with the formal declarations of privilege made by the Attorney General and the Deputy Secretary of Defense. Pet. App. 7a-8a. After reviewing the declarations, as well as additional materials filed under seal, the court was "firmly convinced that the state secrets doctrine applies in this case and makes dismissal necessary." *Id.* at 8a. The court reasoned that summary judgment was appropriate because "[i]n order to defend against [petitioner's] allegations [the government] would have to jeopardize state security." *Id.* at 9a. The court concluded that the government could not effectively counter petitioner's allegation that he was the target of invidious discrimination by the government because respondents "cannot explain or disclose the actual reasons or motivations for their actions without revealing state secrets." *Ibid.*

3. The court of appeals affirmed. Pet. App. 12a-14a. The court of appeals held that the district court correctly sustained the government's assertion of the state secrets privilege because "a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments." *Id.* at 13a. The court of appeals further concluded that dismissal of the case was proper because the government could not "defend their conduct with respect to [petitioner] without revealing the privileged information." *Ibid.*

ARGUMENT

The decision below is correct, and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. "The state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security." *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991). After the privilege is properly invoked, the privileged material is completely removed from the litigation, and the court must determine how the unavailability of the privileged information affects the case. See, *e.g.*, *In re United States*, 872 F.2d 472, 476 (D.C. Cir.) ("Once successfully invoked, the effect of the privilege is completely to remove the evidence from the case."), cert. dismissed, 493 U.S. 960 (1989). In some instances, the case may be able to proceed based solely on non-privileged evidence. See *United States* v. *Reynolds*, 345 U.S. 1, 11 (1953) (concluding that, despite the government's assertion of the state secrets privilege to bar certain evidence, "it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets").

In other cases, an action may be dismissed, even if constitutional claims are involved, when a plaintiff cannot establish his case without the use of such information.[2] Dismissal is likewise required if the inability to

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[2] See, *e.g.*, *Zuckerbraun*, 935 F.2d at 547-548; *Darby* v. *United States Dep't of Defense*, 74 Fed. Appx. 813 (9th Cir. 2003), petition for cert. pending, No. 03-8342 (filed Oct. 27, 2003); *Weston* v. *Lockheed Missiles & Space Co.*, 881 F.2d 814 (9th Cir. 1989); *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984); *Halkin* v. *Helms*, 690 F.2d 977

disclose the information deprives the defendant of evidence essential to a defense. See, *e.g.*, *Molerio* v. *FBI*, 749 F.2d 815, 825 (1984) (holding that privileged information completely prohibited government from defending its decision not to hire plaintiff).

Petitioners contend that the dismissal of their case violated separation of power principles because they were deprived of a remedy for the claims of unlawful discrimination. Pet. 18-27. Under the state secrets privilege, however, "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Reynolds*, 345 U.S. at 11. The action in this case was dismissed only after both courts carefully reviewed the government's assertion of the privilege, as well as the materials filed under seal, and properly determined that the action could not proceed without disclosure of state secrets.

Petitioners also contend that the court of appeals erroneously held that the state secrets privilege extends to cases whose core allegation involves unlawful discrimination by government officials. Pet. 10-15. That contention lacks merit. Contrary to petitioners' suggestion, the court of appeals did not hold that unlawful discrimination itself was a matter of state secret. The court of appeals rather held that dismissal of the case was warranted because the government could not respond to the claims of discrimination in the complaint without revealing state secrets. Pet. App.

(D.C. Cir. 1982); *Salisbury* v. *United States*, 690 F.2d 966 (D.C. Cir. 1982).

13a-14a. That fact-bound application of settled law does not warrant further review by this Court.[3]

2. Petitioners also err in claiming (Pet. 16-17) that the court of appeals' decision conflicts with *In re United States*, *supra*. *In re United States* merely declined to issue mandamus based on a district court's decision to require the government to make an item-by-item assertion of the privilege with respect to specific information or evidence. Contrary to petitioners' assertion (Pet. 16), *In re United States* did not hold that the state secrets privilege was unavailable in cases concerning alleged government violation of the law. Indeed, the D.C. Circuit specifically acknowledged that successful invocation of the privilege may result in dismissal of an action, either because the plaintiff cannot prove a claim without disclosure of the privileged information or because, as in this case, "the privileged information, if available to the defendant, would establish a valid defense to the claim." 872 F.2d at 476. That conclusion is entirely consistent with the court of appeals' decision upholding the government's assertion of the privilege.[4]

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[3] As petitioners observe (Pet. 9), the government filed a motion requesting that the court of appeals' decision in this case be published because the decision "establishes a new rule of law" as contemplated by the Sixth Circuit's Local Rule 206(a)(1). See Pet. App. 16a. The government's motion, however, simply made the point that the decision was "new" in the sense that "[t]he panel decision addresses, for the first time in this Circuit, the state secrets privilege." *Ibid.* The motion did not suggest that the panel's decision broke any new ground or diverged in any way from the precedents of this Court or the other courts of appeals applying the state secrets privilege.

[4] There is no reason to hold the petition pending this Court's decision in *Tenet* v. *Doe*, cert. granted, 124 S. Ct. 2908 (2004) (No. 03-1395). That case does not concern the scope of the state secrets privilege with respect to claims of unlawful discrimination by

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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government employees but concerns whether the government is required in the first instance to comply with the formalities of the state secrets privilege in cases involving claims that the Central Intelligence Agency (CIA) has wrongfully refused to keep its alleged promise to an alleged espionage agent.